Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)

HIGH COURT (KUALA LUMPUR) — SAMAN PEMULA NO D5-24-35-93
ABDUL MALEK J
22 APRIL 1993

Companies and Corporations — *Scheme of arrangement — Application ex parte to restrain creditors from taking action against applicant until completion of scheme of arrangement — Application by secured creditors to set aside restraining order — Whether proposed scheme of arrangement viable, feasible, workable or intelligible — Companies Act 1965 s 176(10)*

The applicant, Twenty First Century Oils Sdn Bhd applied ex parte and obtained an order on 17 February 1993 pursuant to s 176(10) of the Companies Act 1965, inter alia, restraining the applicants' creditors from taking any proceedings as against the applicant or any third party who had given security for or on behalf of the applicant, until completion of the composite scheme of arrangement proposed by the applicant, including proceeding by way of an appointment of receivers and managers in respect of the assets and affairs of the applicant. The Bank of Commerce (M) Bhd, a secured creditor of the applicant applied to set aside the order. This was followed by similar applications by another two of the applicant's creditors.

Held, allowing the creditors' applications:
A proper reading of the proposed scheme of arrangement showed that the scheme was not viable, feasible, workable or intelligible. That aside, even if the meeting was allowed to be held, with the same objections canvassed thereat, it would certainly result in the proposed scheme being rejected. It was more proper and logical, therefore, not to have the scheduled meeting at all as no purpose would be served.

[Bahasa Malaysia summary

Pemohon, Twenty First Century Oils Sdn Bhd telah memohon secara ex parte dan telah mendapat suatu perintah pada 17 Februari 1993 di bawah s 176(10) Akta Syarikat 1965, antara lain, untuk menghalang pemiutang pemohon daripada mengambil sebarang prosiding terhadap pemohon atau sebarang pihak ketiga yang telah memberi jaminan untuk atau bagi pihak pemohon, sehingga selesainya skim persetujuan komposit yang telah dicadangkan oleh pemohon, termasuk juga prosiding melalui perlantikan penerima dan pengurus berkaitan dengan aset dan urusan pemohon. Bank of Commerce (M) Bhd, sebagai pemiutang bercagar telah memohan supaya perintah itu diketepikan. Ini diikuti dengan permohonan yang serupa oleh dua pemiutang pemohon yang lain.

Diputuskan, membenarkan permohonan pemiutang:
Pentafsiran sebenar skim persetujuan komposit yang dicadangkan itu menunjukkan bahawa skim itu tidak berdaya maju, boleh laksana, dapat dijalankan atau dapat difahami. Selain daripada itu, meskipun mesyuarat itu dibenarkan, dengan tentangan yang sama yang telah dibentangkan, skim itu pasti akan ditolak. Oleh itu, adalah lebih betul dan wajar supaya tidak sama sekali menjadualkan mesyuarat itu kerana tidak ada gunanya.]

Notes
For a case on the scheme of arrangement, see 3 *Mallal's Digest* (4th Ed) para 9.

Cases referred to
1 *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69
2 *In the Matter of Chevron (Sydney) Ltd* (1963) VR 249

Paul Ong and *Harinder Kaur* (*Paul Ong & Associates*) for the applicant.
N Chandran and *Pushpa Menon* (*Adnan Sundra & Low*) for the Bank of Commerce (M) Bhd.
PM Tan (*PM Tan Chan & Partners*) for Utama Wardley Bhd.
Kamilah Kasim (*Shahinuddin & Ranjit*) for Rakyat Merchant Bankers Bhd.
Alvin Julian (*Paul Chong & Kraal*) holding a watching brief for United Malayan Banking Corporation.

Abdul Malek J: The applicant had by originating summons filed on 12 February 1993 applied for the following orders ex parte:

(a) that the applicant may be at liberty to convene separate meetings of its classes of creditors, and be at liberty to convene a meeting of its shareholders for the purpose of considering and if thought fit approving with or without modification the composite scheme of arrangement ('the court meetings') proposed to be made between the applicant and its creditors as defined in the composite scheme of arrangement pursuant to s 176 of the Companies Act 1965 (hereinafter 'the Act');
(b) that the directions may be given as to the time, date and place of the court meetings and to the method of convening the applicant's court meetings;
(c) that Mr Gan Ah Tee failing him Mr Ooi Woon Chee both of Peat Marwick Consultants Sdn Bhd may be appointed as chairman and the said chairman be directed to report the results thereof to this honourable court;
(d) that the plaintiff or plaintiffs to the actions or proceedings against the applicant more specifically set out in exh A-7 annexed to the affidavit herein and annexed to the originating summons and all and/or any of the creditors of the applicant be restrained whether by themselves, their servants or agents or otherwise, from all further actions or proceedings

A including but not limited to any court action, appointment of receivers and managers and/or taking any action/proceeding whatsoever under any of the security documents signed with or given to the creditors against the applicant and any third party who have given security for and on behalf of the applicant until completion of the composite scheme of arrangement proposed herein, inter alia, pursuant to s 176(10) of the Act except by leave of court and subject to such terms as this honourable court may impose;

(e) that pursuant to O 62 r 5 of the Rules of the High Court 1980, the applicant may serve a copy of the said restraining order on the plaintiff or plaintiffs to the action or proceedings more specifically set out in the exh A-7 annexed to the affidavit herein and annexed to the originating summons and on the creditors of the applicant or any of them by way of ordinary post at their last known address and that upon such service, this order shall be deemed to have been duly served; and

(f) such other directions as this honourable court shall deem fit.

D The orders were granted on 17 February 1993 and for prayer (b), the court had fixed the time as 10am for secured creditors and 11am for unsecured creditors, the date as 23 July 1993 and the place at the Hotel Regent, Kuala Lumpur.

By summons-in-chambers filed upon a certificate of urgency on 3 March 1993, Bank of Commerce (M) Bhd (hereinafter 'BOC') had applied to intervene to set aside the orders obtained on 17 February 1993, to appoint two named persons from Price Waterhouse as interim receivers and managers pending the application, costs and other relief. This was followed by two other similar applications also filed upon certificates of urgency from Utama Wardley Bhd (hereinafter 'UWB') on 5 March 1993 except that there was no application for the appointment of interim receivers and managers, and from Rakyat Merchant Bankers Bhd (hereinafter 'RMB') on 12 March 1993 except that the two receivers and managers to be appointed were not as an interim measure pending the application.

In my earlier judgment, I had dealt with the applicant's preliminary objection to the court hearing the application to intervene by BOC which I had accordingly dismissed on the grounds that the rule disallowing a party alleged to have committed contempt of court to be heard could not apply to an application to set aside an injunction granted ex parte as the object of such an application is to clear the very contempt complained of and to set aside the very order upon which the alleged contempt is founded.

For these three applications, which were heard jointly, learned counsel for BOC had ably argued that they had at all material times been a creditor of the applicant and that the facilities afforded to the latter had been documented and secured by three debentures which had been duly registered. Subsequently, the applicant had been in default of the terms of the facility arrangements secured by the debentures and BOC had put them on notice as regards the crystallization of the applicant's assets.

Learned counsel had further submitted that BOC made up 92% of the applicant's secured creditors and with UWB and RMB falling under the same class of creditors and similarly objecting to the scheme of arrangement

proposed by the applicant, the said scheme would never materialize for the simple reason that the necessary prerequisites would and could not be met by the applicant. As such, his view was that no useful purpose would be served by holding on to the order complained of and, on top of that, by having to wait till July 1993 for the scheduled meeting with the applicant's creditors not forgetting the expenses incurred to convene the said meeting.

As a secured creditor, learned counsel had added, they were entitled in law to proceed under any security held by them and the order obtained by the applicant was a deliberate attempt to resile from the terms of the security arrangement. With the applicant's assets crystallized pursuant to the terms in the debentures, he emphasized that the applicant was no longer in a position to transact any business and, if the order was allowed to remain, there was every possibility that the applicant's assets would be wrongfully utilized and dissipated.

To further support his contention, learned counsel had made specific mention of the explanatory statement to the scheme of arrangement prepared by Peat Marwick Consultants Sdn Bhd which had proposed at p 13 that:

> ... the parent company as part of their contributions to ensure the success of the scheme will be required to inject additional funds of about RM11m into the company ... and the existing bankers shall sanction fresh bank guarantee facilities of about RM15m in order to purchase CPO on credit terms of 30 days ...

And which at p 18 had stated:

> However, when the scheme is accepted, the company's negative net worth will be reduced by RM17m from the balance sheet as at 30 November 1992 and the creditors will be repaid from 30% to 75% of the amount outstanding except for the essential creditors.

As a secured creditor, he emphatically enunciated that they could never agree to the proposals made.

Based on all these factors, learned counsel for BOC had reiterated that the proposed scheme was not viable in the circumstances. Learned counsel for UWB had echoed the sentiments of learned counsel for BOC and had also reminded the court that the first prerequisite to such a scheme was a compromise or arrangement between the company and its creditors and in fact there was no such evidence here as regards the scheme having being proposed at all after such an agreement between the relevant parties.

Learned counsel for UWB had also referred in particular to paras 8 and 9 of the applicant's affidavit in support of their application which he submitted negated one another. The relevant paragraphs read:

> 8 In general, the palm oil refining industry in Malaysia has been experiencing a difficult phase. This is especially so for independent refiners who do not have their own plantations. The situation is evidenced by the shut-down of one of the country's top refiners Nalin Industries Sdn Bhd ('Nalin'). The plight of the industry is due mainly to the rising cost of production (both in the price of CPO and overheads), without a matching increase in the prices of finished products, hence resulting in low and negative profit margins. The tight margins are further exacerbated by the situation of excess production capacity in the industry. In addition the prices of palm stearin, which comes as one of

A the main by-products in the processing of CPO have been especially under pressure for the last two years due to sudden fall in demand for the product particularly from the erstwhile Soviet Union. Due to the nature of this industry also, all refiners, with the exception of those with their own plantations, are forced to take position in the commodities futures. This has severely affected a number of refiners when the prices move against them. Many B refineries have shut down during the last few years.

9 The applicant has not been spared from the plight of the industry. The company has suffered a net loss of about RM40m since commencement of operations mainly due to sudden drop in the prices of palm stearin resulting in insufficient margins, rising overheads as well as unfavourable movement of commodity prices. The downturn in market sentiments, especially after the C closure of Nalin, further led to a credit squeeze by the company's suppliers. As the company was not able to raise sufficient working capital this has prevented the company from reaching optimum capacity. Consequently, the company was not able to fulfil a good number of contracts thus causing further wash-out losses. The company had no choice but to temporarily cease production sometime in May 1992. This invariably led to a number of legal D actions being instituted against the company.

He had also made reference to p 14 of the explanatory statement to the proposed scheme of arrangement which had stated that:

> Based on the above compromise with the creditors, it is estimated that an immediate bank guarantee facility of about RM6m would be required in the first E four months in order to implement the scheme. Further bank facilities of RM9m will be required in the subsequent three years. In addition, a cash injection of about RM11m is required over the seven-year period commencing from June 1993.

This, he bluntly added, was fatal to the scheme. It was his view that it was F incumbent upon the applicant to satisfy the court that the scheme was feasible and the relevant bank certainly could not be compelled to inject so much money into the scheme.

He had also pointed out that in view of the three fourths statutory majority stipulated in s 176(3) of the Act and the fact that the secured creditors were not prepared to support the scheme clearly indicated that it G was doomed to fail. Consequently, he said that there was no purpose served in having the proposed July 1993 meeting as it would also have the further effect of dissipating the assets of the applicant in having to hold it.

Learned counsel for RMB supported the arguments of the earlier two counsel and added that even if the court was inclined to disagree with their H submissions, the applicant's assets must be preserved for the secured creditors. It is also proper and pertinent at this stage to place on record that in the course of the proceedings, learned counsel for United Malayan Banking Corp (hereinafter 'UMBC'), another secured creditor, who had been present all throughout, had promptly stood up, when learned counsel for the applicant had reminded the court that not all the secured creditors I had applied to intervene, to tell the court that he was holding a watching brief for UMBC.

Learned counsel for the applicant had told the court by way of reply that their application had been made in good faith after two months of

consultations and their asking for the meeting for the proposed scheme of arrangement was never intended to be an obstacle. In addition, he said that the relevant notices had been sent out and quite extensive preparatory work was involved. He submitted that the court should consider the interest of the unsecured creditors whereas the secured creditors could voice their objections at the meeting. He argued that it was also a serious endeavour of the applicant to come in with more funds to the tune of a further investment of RM11m in the next seven years after the promoters of the applicant had come up with RM33m so far. He also stated that it was in the court's discretion to defer the matter until the meeting was held.

Having deliberated on the submissions, it was my finding that a proper reading of the proposed scheme, in the light of the arguments of learned counsel for all three secured creditors, who in any case form more than the three fourths majority required to approve it, and learned counsel for the applicant, clearly showed that the proposed scheme of arrangement was not viable, feasible, workable or intelligible. That aside, even if the meeting was allowed to be held, with the same objections canvassed thereat, it would certainly result in the proposed scheme being rejected. It was more proper and logical, therefore, not to have the scheduled meeting at all.

In *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd*,[1] the Supreme Court of New South Wales had pronounced that the court will not ordinarily summon a meeting to consider a scheme of arrangement unless the scheme is of such a nature and cast in such terms that the court would be likely to approve it on the hearing of an unopposed petition if the statutory majority is obtained at the appropriate meeting of creditors.

In the Matter of Chevron (Sydney) Ltd,[2] the Supreme Court of Victoria had held that in sanctioning a proposed scheme of arrangement, the court must be satisfied not only that the support of the statutory majorities in value and number of company shareholders and debenture holders at meetings duly convened and held have been obtained but also that the arrangement can reasonably be supposed by sensible business people to be for the financial benefit of both shareholders and debenture holders as such.

On these considerations, I could only conclude that no purpose would be served under these circumstances in holding the proposed meeting. I had, therefore, accordingly granted the three applications with costs but had found no necessity to order the appointment of receivers and managers either as an interim measure or otherwise.

Order accordingly.

Reported by Wong Kim Fatt